No. 97-475

MOTION FILED
OCT 10 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Air Transport Association (IATA) respectfully moves to file the attached Brief as *amicus curiae* in this case. The consent of counsel for the petitioner was obtained. The consent of counsel for respondent was requested and refused.

The interest of IATA in this case stems from the fact that its 258 member airlines[1] consider that this case presents issues of national and international importance which warrant review by the Court. IATA's interest and position are set forth more fully in its Brief attached to this motion.

[1] IATA Active and Associate Members are listed in the Appendix hereto.

Respectfully submitted,

/s/ BERT W. REIN

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Dated: October 10, 1997

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BRIEF OF INTERNATIONAL AIR TRANSPORT ASSOCIATION AS *AMICUS CURIAE*

The International Air Transport Association (IATA) respectfully submits this Brief *amicus curiae* in support of the Petition of EL AL Israel Airlines, Ltd. (EL AL) for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit with respect to its decision in *Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), *petition for cert. filed*, No. 97-475, 66 U.S.L.W. 3203 (U.S. Sept. 11, 1997).[1]

[1] Pursuant to Sup. Ct. R. 37.6, IATA discloses that petitioner EL AL Israel Airlines, Ltd., as a member of IATA and on its own behalf, authored this brief in substantial part and bore the expense of printing the brief.

The Nature of IATA's Interest

IATA is an organization of 258 international and domestic air carriers, including substantially all of the scheduled international air carriers, the majority of which are either owned by or controlled by sovereign nations. Many of its member airlines carry passengers, baggage and goods to and from the United States and, therefore, are subject to litigation in the United States. IATA provides, *inter alia*, coordination and leadership for the efforts of the world's airlines to achieve uniformity with respect to the interpretation of various international agreements affecting aviation, and it seeks to promote safe, regular and economical air transportation for the benefit of the peoples of the world. IATA was organized pursuant to a Special Act of the Canadian Parliament (September 1945) with its Head Office in Montreal, Quebec.

REASONS FOR GRANTING THE WRIT

The questions presented by the decision of the court below are of substantial importance to the international airline industry and consequently, IATA. The goal of uniformity with respect to the law applicable to liability in international air transportation conducted to and from all countries of the world has been dealt a substantial blow by the conflict of the decision below with the decision of the Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996), and the decision of the House of Lords of the United Kingdom in *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.). The inconsistent interpretations of Article 17 and related provisions of the Warsaw Convention[2] by the Circuit Courts of Appeals are contrary to a main purpose of the Convention, which was to attain uniformity

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

with respect to liability arising out of international air transportation of passengers, baggage and goods. The decision thus greatly affects the member airlines of IATA.

In recognition of the dissatisfaction of many members of IATA and parties to the Convention, such as the United States, with respect to the low liability limit for passenger injury or death, IATA spearheaded an "umbrella accord" undertaking to waive the limitations of liability as set out in the Warsaw Convention, Hague Protocol (1955),[3] Montreal Agreement of 1966[4] and/or limits otherwise previously agreed to by carriers or imposed by governments. On July 31, 1996, IATA filed with the United States Department of Transportation (DOT) an Application seeking approval of the IATA Intercarrier Agreement on Passenger Liability (IIA) and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA).

On January 8, 1997, the DOT issued an Order on reconsideration which approved the IIA, now signed by nearly 100 carriers around the world and the MIA, currently signed by nearly 60 carriers. *See International Air Transportation Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by D.O.T. Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997). Under this DOT Order, those carriers which accept the mandatory provisions of the MIA by filing tariffs agree not to avail themselves of the limitation of liability under Article 22(1) or the 1966 Montreal Agreement. However, the Warsaw Convention system defenses will remain available, in whole or in part, to the carriers signatory to the Agreement, unless a carrier decides to waive them or is so required by a governmental authority.

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[3] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 12, 1929, September 28, 1955, 478 U.N.T.S. 371.

[4] *See* 49 U.S.C. § 1471 (1997).

Thus, even with respect to those air carriers which have filed their conditions of carriage and amended their tariff rules, the right of a potentially unlimited recovery for passenger injury or death arising out of "international transportation" still requires resolution of the issue of exclusivity of the Convention.

The decision below, finding that the Warsaw Convention does not provide a plaintiff's exclusive right of recourse against an air carrier for claims arising out of "international transportation" within the meaning of Articles 1 and 17 of the Convention, is in accord with the decision of the United States Court of Appeals for the Third Circuit in *Abramson v. Japan Airlines Co. Ltd.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), but is directly contrary to the interpretation of the Convention by the United States Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, and also the House of Lords of the United Kingdom in *Abnett v. British Airways*. The uncertainty as to liability for claims arising out of "international transportation" by air manifested by the decision below could be wholly eliminated in the United States if the Court grants the petition for a writ of certiorari.

Moreover, in conjunction with IATA's attempts to attain uniformity in the area of transportation documentation, its members have adopted Resolutions that extend the time limits within which a claimant must provide notice in writing of a cargo or a baggage claim. *See* IATA Resolution 600b(II) and 724, respectively.[5] The fraud exception to the written notice requirement under Article 26 of the Warsaw Convention, however, has not been waived with respect to baggage or goods claims and thus remains applicable.

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[5] There are IATA resolutions and recommendations on varied subjects involving international aviation. Although adopted by airlines, before becoming effective they are approved by governments. Several governments rely upon IATA to develop the uniformity of documentation necessary for international air transportation.

The court below has lowered the standard from fraud to a lack of interest in a claim on the part of any alleged employee of an air carrier and, thus at the stroke of a pen, written out of the Convention the written notice of claim provisions which otherwise prevail throughout the world. The court below failed to apply an express treaty condition precedent to liability for damage to baggage or goods.

A court has a duty to give the provisions of a treaty "a fair interpretation, according to the intention of the contracting parties . . . so as to carry out their manifest purpose." *Wright v. Henkel*, 190 U.S. 40, 57 (1903). *Accord Nielson v. Johnson*, 279 U.S. 47 (1929).

IATA, in representing the interests of international air carriers, is keenly aware of the havoc that forum shopping presents to international air carriers in general and to claims governed by the Warsaw Convention in particular. Irrespective of which state or federal court a plaintiff chooses to bring suit against an air carrier, the answer to the question whether the carrier is liable in the United States for a claim arising out of "international transportation" should be the same.

CONCLUSION

The world's air carriers desire a uniform interpretation of the Warsaw Convention, particularly in the United States where the carriers are constantly subject to litigation over the interpretation of this treaty. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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